Filed 3/9/12 P. v. Bustillos CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO JAVIER BUSTILLOS, Defendant and Appellant.	G044598 (Super. Ct. No. 09CF3075) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Eric S. Multhaup, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Christine Levingston Bergman, Deputy Attorney General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Francisco Javier Bustillos of first degree murder (Pen. Code, § 187, subd. (a) and street terrorism (*id.* § 186.22, subd. (a)). It also found true allegations defendant committed the murder under gang special circumstances (*id*. § 190.2, subd. (a)(22)), for the benefit of, at the direction of, or in association with a criminal street gang (*id.* § 186.22, subd. (b)), and while vicariously discharging a firearm causing death to the victim (*id.* § 12022.53, subds. (d) & (e)(1)). The court sentenced him to life in prison without the possibility of parole, plus 25 years to life.

Defendant contends he was deprived of due process and other rights when the court erroneously excluded his evidence of good character and admitted a detective's testimony regarding prior statements by a witness who refused to testify at trial, and because the evidence was insufficient to support the finding of premeditation and deliberation. Finding no error, we affirm.

FACTS

One afternoon, defendant, a member of the Southside criminal street gang, drove his girlfriend, Deidra Beltran, home in his truck. She fell asleep and did not know what time defendant left. Defendant had told her he had to go to a mandatory gang meeting about retaliation.

That evening, defendant drove Jeremiah Salas and Salas's cousin Alfredo Gonzalez in his truck to a house on Diamond Street in Santa Ana. Southside gang member Joseph Sanchez was there and other apparent members of the gang arrived later. One of them walked down the street and crossed out graffiti placed there earlier by a rival gang, West Side Santa Ana, also known as "Comps" or West Side Compadres, and placed "SS" next to it to "reclaim[Southside] territory" before returning to the rest of the group standing in front of the house.

Around 7 p.m., over five shots were fired from a minivan at the group. Sanchez ran at the minivan and when he returned, the group held a short meeting in front of the house. Three of the men got into a Saturn and drove off; defendant and Sanchez followed in defendant's truck. Defendant and Sanchez returned to the house between 8 and 9 p.m. but in a different vehicle. Defendant appeared jumpy and nervous, and told Gonzalez his truck was "broke[n"] and "doesn't work anymore" so he "left it there." Defendant and Sanchez went around the house to the backyard, where Sanchez took off his sweatshirt. Police subsequently found the remnants of a burnt sweatshirt in a wheelbarrow.

Near the same time the shots were fired from the minivan, Alejandra Perales was driving home in her Altima. Her boyfriend, Rodrigo Martinez, followed in his Mustang to ensure she arrived safely. After they turned right from McFadden onto Pacific, a truck stopped in front of Perales. Perales stopped her car and ducked when two men got out of the truck and started shooting. She believed they were shooting at a man walking on the sidewalk.

When the shooters began running, Perales continued driving until she realized Martinez was not behind her. She turned the car around and returned to where the shooting occurred. She found Martinez's Mustang stopped in the middle of the street having crashed into defendant's truck and Martinez unconscious from a gunshot wound to the head. A single bullet had pierced the bottom of the Mustang's front windshield.

Police arrived at the scene shortly before 8 p.m. An officer determined the Mustang had been traveling 30 to 35 miles per hour when it hit the truck, rendering the truck inoperable. Defendant and his mother were the registered owners of the truck. Police found cartridge cases from two different guns at the scene.

Police interviewed Beltran two days after the shooting. Despite being "scared to death to be a rat," Beltran told police defendant believed Martinez intentionally crashed into him, after which everyone ran from defendant's truck. When

she asked who he was with and "who his homeboys were shooting at," defendant said, "don't worry about it, we all ran" and that they were "directly shooting at the guy in the Mustang."

Gang expert Julian Rodriguez testified the West Side Santa Ana graffiti in Southside territory was an example of gang turf war, challenging Southside to defend its territory. Failing to meet such disrespect with equal or greater disrespect sends a message the gang is weak. Retaliation could consist of simply tagging West Side Santa Ana's turf with Southside graffiti or it could escalate to homicide. If guns are used against a gang, retaliation is expected, often in the form of a second shooting, and the sooner it happens, the stronger the message to the rival gang. A gang member elevates his status within the gang by having a gun and earns respect by participating in a retaliatory shooting.

The house on Diamond Street was in Southside claimed territory. The shooting occurred slightly to the southwest of there, in "the epicenter of Comps territory," where Southside gang members would go to find a Comps gang member.

DISCUSSION

1. Character Evidence

During cross-examination, Beltran testified defendant was gainfully employed, had not told her he shot anyone or confessed to any crime, and that she had never seen him with a gun. The following colloquy then occurred:

"[Defense counsel]: So the district attorney is making this a gang case that gang members go out and just shoot up neighbors all day long. Is that what [defendant] would do on a daily basis?

"A: No sir.

"[Prosecutor]: Calls for speculation. Improper character evidence.

The court: Also argumentative. [¶] Sustained as phrased.

[Defense counsel]: [¶] Did you ever see [defendant] suit up in the morning with a gun and go out and shoot up a bunch of people?

"A: No sir.

"[Defense counsel]: Was he that type of person?

"[Prosecutor]: Calls for improper character evidence, your honor.

"The court: Sustained as phrased."

Defendant contends the trial court's rulings violated his Sixth and Fourteenth Amendment right to present a defense in the form of good character evidence. We disagree.

Even assuming the court erred in sustaining the prosecution's objections, "[a]pplication of the ordinary rules of evidence" to exclude character evidence "does not impermissibly infringe on a defendant's right to present a defense. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 440.) "Although completely excluding evidence of an accused's defense theoretically could rise to this level" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103), that did not happen. Beltran testified she never saw defendant with a gun or heard him say he ever shot anyone or confess to a crime. Nor had she seen a gun in his truck or known him to carry one. Additionally, after sustaining the prosecution's objection to the question of whether defendant would shoot up people on a daily basis, the court allowed Beltran to testify she never saw him do that.

Defendant maintains Beltran's testimony about not having seen him "'suit up in the morning with a gun and go out and shoot up a bunch of people'" was sandwiched between prosecutorial objections sustained by the . . . court" such that "[t]he clear impression on the jury was that this evidence was not to be considered." But "in the absence of an affirmative showing that the jury misunderstood the ruling [in that manner], we cannot presume that the rights of the defendant were prejudiced thereby . . . ." (*People v. Garcia* (1927) 83 Cal.App. 463, 468.) Moreover, even if the

jury erroneously believed it was not to consider Beltran's testimony about not seeing defendant "suit up" and shoot people, it could infer the same conclusion based on her testimony she never saw him carry a gun on his person or in his truck.

In any event, "'there was no refusal to allow [the defendant] to present a defense, but [at most] only a rejection of some evidence concerning the defense.' [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 . . . ." (*People v. Fudge*, *supra*, 7 Cal.4th at pp. 1102-1103; see also *People v. McAlpin* (1991) 53 Cal.3d 1289, 1311 [*Watson* standard applies to erroneous exclusion of character evidence]), contrary to defendant's assertion. Under that standard, the erroneous exclusion of evidence is harmless unless it is reasonably probable that a result more favorable to defendant would have been reached had the evidence been admitted. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Such probability did not exist here.

First, whether defendant was the type of person to "suit up" and shoot people would not have added much to the evidence given Beltran's testimony she had never seen him with a gun. Second, the evidence established defendant was involved in Martinez's shooting. After the shots were fired from the minivan, defendant and Sanchez drove off in defendant's truck, which was found at the scene where Martinez was shot less than an hour later. Defendant and Sanchez returned to the Diamond Street house shortly after that in a different vehicle, with defendant appearing jumpy and nervous.

Defendant argues the fact his truck was involved in the accident does not mean he was; nor does his being seen by witnesses leave in his truck with Sanchez constitute evidence "sufficiently strong to cure the error from the exclusion of defense evidence," as "[y]oung people borrow each other's vehicles all the time . . . ." But the evidence does not stop there. Defendant told Beltran he believed Martinez intentionally crashed his Mustang into his truck, and that he and "his homeboys were" "directly shooting at the guy in the Mustang." Under these facts, there is no reasonable probability

defendant would have received a more favorable outcome had the court allowed Beltran to give her opinion on whether he was the type of person to go out and shoot people.

2. Admission of Salas's Prior Statements

Called as a prosecution witness, Salas testified on direct examination he was 22 years old, lived in Santa Ana, worked in a warehouse. Additionally, defendant drove a "bluish green truck" and was his sister's boyfriend, known as Frankie Bustillos, whom he has called "Bullet" and knew to be a Southside gang member, although he himself was not a member of any gang. The house on Diamond Street belonged to his other sister and he acknowledged he was there on the day Martinez was shot with his cousin Alfredo Gonzalez, but claimed he did not remember how he got there. He also disclosed he and Gonzalez were standing in the front yard of the house close to the street when over five gunshots were fired out of a minivan from the direction of Edinger, where a bakery was located. They did not call the police about the shooting because no one had been hit.

But when asked if he remembered what happened that day, he answered "not really," although he did remember a "little bit" talking to police at the police station about the case a day or two later. He had not wanted to talk to police and did not want to be in court, but was not worried about being a "rat," though that might be the reason he lied to the police when he first spoke to them. He refused to read a copy of his statement to police, stating he "would rather not read it."

Salas did not remember how he got to the house or if defendant was present, nor whether defendant was in the front yard with him and drove off in his truck with Sanchez after the shots from the minivan. He subsequently admitted defendant had driven him and Gonzalez in his green truck to the Diamond Street house but later claimed he was unable to recall if it was in his sister's car or defendant's truck. He also responded, "Yeah" when asked if he told police defendant and Sanchez left in

defendant's truck, but then retracted it and said he did not remember. Similarly, although he initially testified he remembered telling police Sanchez was wearing a gray hoodie sweatshirt, he subsequently claimed he did not remember.

On cross-examination by defendant's attorney, Salas explained how police took him and Gonzalez to the police station two days after the shooting for questioning. Police told him the murder could have been gang related and in retaliation for something and that he fit the description of the shooter. Salas got "a little scared" and "wanted to protect [him]self." He described the five plus shots from the gray minivan near the bakery, the absence of a 911 call, and his beer consumption before and after the shooting. He did not recall any conversations with defendant that afternoon.

When cross-examined by Sanchez's attorney, Salas denied remembering if defendant showed up with Sanchez at the Diamond Street house, the color or style of the sweater Sanchez was wearing or if he wore gloves, or whether defendant and Sanchez left or returned, stood in front of, or walked to the back of, the house together. Salas answered "No" to whether he would be able to recall what Sanchez or defendant did if counsel asked him 30 questions about each and there was nothing that would help him remember.

After Salas testified, the prosecution called Detective Jason Garcia to testify about Salas's prior inconsistent statements and a hearing was held outside the jury's presence. Sanchez's counsel argued he had "effectively been denied the right to cross-examine [Salas]" because despite answering some questions, Salas "still refused to answer all of [his] questions regarding critical incidents that night." Defendant's attorney joined in the motion to strike Salas's testimony.

The court ruled the prior inconsistent statements were admissible under Evidence Code section 1235, as "[i]ts very obvious . . . [Salas] was being evasive. He didn't want to be here. He didn't want to be a rat." Sanchez's counsel maintained there was a confrontation problem under *Crawford v. Washington* (2004) 541 U.S. 36 [124

S.Ct. 1354, 158 L.Ed.2d 177]. The court disagreed and "ma[d]e a factual finding that based on the body language, the demeanor, and [Salas's] comments . . . , [Salas] was purposely evasive, [and] was . . . feign[ing] memory loss" because he did not want to be involved, as shown by his refusal to look at his prior statement. It further found Salas was "being willfully evasive" and "untruthful" when he repeatedly stated he did not remember things. It believed the facts presented a classic scenario under *People v. Green* (1971) 3 Cal.3d 981, overruled on another ground in *People v. Chavez* (1980) 26 Cal.3d 334, 357, and was similar to those in *People v. Perez* (2000) 82 Cal.App.4th 760, a gang-related case where the witness was also deliberately evasive. It determined *People v. Gunder* (2007) 151 Cal.App.4th 412 (*Gunder*) was "right on point" because the defendant there objected under *Crawford.*

Defendant argues the admission of the prior inconsistent statements violated his Sixth Amendment right to confront and cross-examine witnesses. We disagree.

"*Crawford v. Washington* . . . held that the right to confrontation precludes the admission of extrajudicial testimonial statements of witnesses who are not available at trial except where the defendant had an opportunity to cross-examine them on a prior occasion. [Citation]" (*Gunder, supra,* 151 Cal.App.4th at p. 419, fn. omitted.) Generally "a witness with genuine memory loss is considered available for a defendant's cross-examination. [Citation.]" (*Ibid.*) *Gunder* came to the same conclusion with regard to "a witness who appears at trial but feigns a lack of memory . . . ." (*Gunder, supra,* 151 Cal.App.4th at pp. 419-429.)

The defendant in *Gunder* had argued that, unlike a witness with genuine memory loss, who is considered available for cross-examination, "a witness who refuses to answer questions through a feigned memory loss should be deemed the equivalent of a witness who entirely refuses to answer questions." (*Gunder, supra,* 151 Cal.App.4th at p. 419.) Rejecting this, *Gunder* held the admission of a trial witness's prior statement after

the witness pretended not to remember did not violate the confrontation clause, stating: "The circumstance of feigned memory loss is not parallel to an entire refusal to testify. The witness feigning memory loss is in fact subject to cross-examination, providing a jury with the opportunity to see the demeanor and assess the credibility of the witness, which in turn gives it a basis for judging the prior hearsay statement's credibility. '[W]hen a hearsay declarant is present at trial and subject to unrestricted cross-examination . . . the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements.' [Citation.] In the face of an asserted loss of memory, these protections 'will of course not always achieve success, but successful cross-examination is not the constitutional guarantee.' [Citation.]" (*Gunder, supra*, 151 Cal.App.4th at p. 420; see also *People v. Perez*, *supra*, 82 Cal.App.4th at pp. 765-766 [pre-*Crawford* case rejecting argument witness's claimed inability to remember denied the defendant right to confrontation].)

Salas was present at trial and available for cross-examination by defendant. Salas did not refuse to testify and defendant does not challenge the trial court's finding Salas's memory loss about specific aspects of the events on December 15, 2009 was feigned. The admission of Salas's prior statements, therefore, did not violate the confrontation clause.

Defendant asserts *Gunder* is "fundamentally flawed" because it did not address the statement in *United States v. Owens* (1988) 484 U.S. 554, 561 [108 S.Ct. 838, 98 L.Ed.2d 951] that "[o]rdinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." Under *Owens*, the opportunity for cross-examination "is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad

memory." (*Id.* at p. 559.) According to defendant, this means "[t]he key to the [*Owens*] court's ruling is that the victim [must] 'respond[] willingly to [all] questions' regarding what he did remember, what he did not remember, and other circumstances elicited by defense counsel." We are not persuaded.

Owens never required *all* questions be responded to willingly. Rather, it held although "limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination . . . no longer exists[,] . . . that effect is not produced by the witness' assertion of memory loss—which . . . is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement." (*United States v. Owens*, *supra*, 484 U.S. at pp. 561-562.) It further noted "[i]t would seem strange, for example, to assert that a witness can avoid introduction of testimony from a prior proceeding that is inconsistent with his trial testimony, [citation], by simply asserting lack of memory of the fact to which the prior testimony related. [Citation.]" (*Id*. at p. 563.)

Defendant maintains subsequent confrontation cases have reaffirmed "[t]he willingness-to-answer-questions component of the cross-examination criteria of *Owens* . . . ." But the only case he cites is *United States v. Torrez-Ortega* (10th Cir. 1999) 184 F.3d 1128, which is not binding on this court. (*People v. Zapien* (1993) 4 Cal.4th 929, 989 ["decisions of intermediate federal appellate courts, while they may be of persuasive value, are not binding on state courts, even when they interpret federal law"].) Moreover, the prosecution's witness in that case refused to testify at all, asserting his privilege against self-incrimination. (See *United States v. Torrez-Ortega*, *supra*, at pp. 1132-1133.) That did not happen here.

Defendant also contends *Gunder* "fails to recognize that a witness who claims a privilege is functionally indistinguishable for confrontation purposes as a witness who claims lack of memory." But the cases he relies on do not support that

position. *United States v. Torrez-Ortega*, in fact, rejected the "attempt to link by analogy cases in which a witness professes loss of memory—real or otherwise—and cases in which a witness simply refuses to testify on the basis of an assertion of privilege. *Owens* clearly indicates that a witness's assertions of privilege may prevent viable cross-examination. [Citation.] 'But that effect is not produced by the witness' assertion of memory loss—which . . . is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement. [Citation.] The contrast to a case such as this is stark. [Citation.]" (*United States v. Torrez-Ortega*, *supra*, 184 F.3d at p. 1134, fn. omitted.)

Under this reasoning, which we find persuasive and adopt, the cases defendant cites are inapposite because they all involve witnesses who refused to testify based on privilege. (See *Douglas v. Alabama* (1965) 380 U.S. 415, 419 [85 S.Ct. 1074, 13 L.Ed.2d 934]; *People v. Morgain* (2009) 177 Cal.App.4th 454, 465; *People v. Rios* (1985) 163 Cal.App.3d 852, 864 & fn. 4; *People v. Shipe* (1975) 49 Cal.App.3d 343, 349-351.) Having so concluded, we need not address defendant's arguments about "policy reasons for treating invalid claims of privilege and feigned memory loss as constitutionally identical" or resulting prejudice.

3. Substantial Evidence of Premediation and Deliberation

Defendant asserts the evidence was insufficient to show he murdered Martinez with premeditation and deliberation. We disagree.

Under *People v. Anderson* (1968) 70 Cal.2d 15, the three categories of evidence that are generally relevant to resolving these issues are "'planning' activity," motive, and manner of killing. (*Id*. at pp 26-27.) But "'*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. . . .' Thus, while premeditation and deliberation must result from '"careful thought and weighing of considerations"' [citation], we continue to

apply the principle that '[t]he process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." [Citations.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331-332.)

Evidence of each of the three *Anderson* factors is not necessary to support a first degree murder conviction based on a theory of premeditation and deliberation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) But the evidence must show the defendant made "'a cold, calculated judgment, including one arrived at quickly[,] . . . [that] is evidenced by planning activity, a motive to kill, *or* an exacting manner of death.' [Citation.]" (*People v. Nazeri* (2010) 187 Cal.App.4th 1101, 1113.)

Defendant contends there was no evidence of a plan to kill, but at most only a plan to discharge firearms in rival gang territory in a reaction to the shots from the minivan. The claim lacks merit. Viewing the evidence in the light most favorable to the judgment (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331) shows after the shots from the minivan were fired a meeting was held by Southside gang members in front of the Diamond Street house. Upon the meeting's conclusion, three of them drove off in one car while defendant and Sanchez followed in defendant's truck into rival gang territory, bringing loaded guns with them. Defendant believed the victim had purposefully crashed his Mustang into his truck and in response he and "his homeboys" "directly sh[ot]" at Martinez, hitting him in the head. They also shot at a man walking on the sidewalk.

From these facts, the jury could have reasonably inferred defendant drove into Comps' claimed territory with the plan to shoot a rival gang member, not merely to "discharge a firearm in someone else's neighborhood," as defendant asserts, and when he believed Martinez was trying to kill him first by intentionally crashing into his truck, defendant quickly made a cold, calculated decision to shoot at Martinez directly, hitting him in the head. (*People v. Nazeri*, *supra*, 187 Cal.App.4th at p. 1113.) These same facts

establish motive for killing Martinez and the absence of accident, contrary to defendant's assertions. Defendant has not shown "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin*, *supra*, 19 Cal.4th at p. 331.) As a result, reversal is not warranted.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.